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82-436

No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term 1982

THOMAS MARSHALL IRWIN,

Petitioner,

VS.

STATE OF ALABAMA,

Respondent.

Petition for a Writ of Certiorari

to the Supreme Court and the Court of

Criminal Appeals of Alabama

J. Doyle Fuller
Attorney for
Petitioner

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QUESTION PRESENTED

Whether the Petitioner's right to equal protection under the Fourteenth Amendment of the United States Constitution has been denied by the divergent application of Alabama's "knock and announce" rule in the execution of a search warrant.

PARTIES

In the Circuit Court of St. Clair County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: Thomas Marshall Irwin, Petitioner herein, and the State of Alabama, Respondent herein.

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TABLE OF CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISION

This case involves the Fourteenth Amendment to the Constitution of the United States and Section 15-5-9, Code of Alabama (1975).

OPINION BELOW

The conviction of the Petitioner was affirmed by opinion of the Alabama Court of Criminal Appeals dated March 2, 1982. Application for rehearing in that court was timely filed wihch said application was overruled without opinion on April 20, 1982. The Alabama Supreme Court denied a timely Petition for Writ of Certiorari on July 2, 1982, without opinion.

A copy of the opinion and order reflecting these actions are attached hereto as Appendix "A".

JURISDICTION

The judgment of the Supreme Court in denying the Writ of Certiorari to the Court of Criminal Appeals of Alabama was entered on July 2, 1982. The effect of this opinion was to exhaust Petitioner's avenues of relief in the highest court of the State of Alabama, and to affirm the opinion of the Court of Criminal Appeals of Alabama.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution reads as follows:

> ". . . All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State herein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; now deny any person within its jurisdiction of equal protection of the law. . . ."

Section 15-5-9, Code of Alabama (1975) reads as follows:

§15-5-9. Authority of serving officer to break into house.

The execute a search warrant, an officer may break open any door or window of a house, any part of a house or anything therein if after notice of his authority and purpose he is refused admittance."

STATEMENT OF THE CASE

The Petitioner, Thomas Marshall Irwin, was indicted by the July 1980 term of the St. Clair County, Alabama, Grand Jury for the crime of violation of the Alabama Uniform Controlled Substance Act (possession of Cocaine).

The case was tried to the Circuit Court of St. Clair County, Alabama, by stipulation of facts without benefit of a jury. Upon said stipulation of facts, the trial court found the Defendant guilty of possession of Cocaine and sentenced him to a term of seven and one-half years in the penitentiary.

Thereafter, appeal was perfected by trial counsel for the Petitioner to the Court of Criminal Appeals of Alabama entered its opinion affirming the conviction of the Defendant. Application for rehearing to the Court of criminal Appeals was overruled. On July 2, 1982, the Alabama Supreme Court denied Your Petitioner's Petition for Writ of Certiorari in that court.

This Petition is submitted to review the rulings of the Appellate Courts for the State of Alabama wherein they held that police officers in executing a search warrant

for drugs or other narcotics were not required to comply with the provisions of Section 15-5-9, Code of Alabama (1975), which is commonly known as the Alabama "knock and announce" rule.

STATEMENT OF THE FACTS

In the early morning house of January 28, 1980, officers of the Birmingham City Police Department, the St. Clair County Sheriff's Office and members of the news media went to Defendant's residence located in rural St. Clair County, Alabama, armed with a search warrant, the propriety of which is not at issue before this Court. The police officers approached the door of Petitioner's residence and within less than twenty seconds, entered the premises through an unlocked door. In conducting the search,

a quantity of a substance later identified as Cocaine was found in the residence and Your Petitioner, along with two other individuals, was charged with possession of the same. The case proceeded through the trial and appellate court levels of the State of Alabama on the theory that the officers failed to comply with the provisions of §15-5-9, Code of Alabama (1975), in that they were never refused admittance, nor does the record reflect that any activity was detected inside the residence to indicate that destruction of evidence or other contraband was in progress. To the contrary, the police officers testified that all individuals inside the house were asleep and had to be aroused after they entered the premises. In numerous cases, which will be discussed infra, the courts of the State of Alabama have held that police officers in executing search

warrants must strictly abide by the provisions of §15-5-9, Code of Alabama (1975), in that they may not enter the premises without an affirmative refusal of admittance or the lapse of sufficient time to amount to an implied refusal of admittance. The courts have recognized an exception akin to "extigent circumstances" wherein officers who detect furtive or other movement inside the premises which indicate the destruction or likelihood of destruction of the substance or evidence sought are authorized to make immediate entry into the premises without further compliance with §15-5-9, Code of Alabama (1975). The effect of the ruling of the court in the case sub judice is to grant an additional exception to the "knock and announce" rule when the officers are seeking under the search warrant to seize narcotics. The court justified this ruling

on the sole premises that law enforcement officers are reasonable in assuming that narcotics or other substances will be destroyed because of the easily destroyable nature of the same. It is Petitioner's contention that there is no reasonable basis for distinquishing between narcotics and other evidence sought under a search warrant solely on the basis of the nature of the substance sought.

ARGUMENT

REASONS FOR GRANTING THE WRIT

On behalf of the Petitioner it is submitted to the Honorable Court that the Writ of Certiorari should be granted to consider the question of denial of equal protection to Your Petitioner under the decisions of the Court of Criminal Appeals of Alabama.

The facts of this case, as embodied in the opinion of the Court of Criminal Appeals of Alabama, reflect that the only reasonable inference to be drawn from the action of the Court of Criminal Appeals of Alabama in its opinion is that a distinction has been made in the standards for the execution of a search warrant in the State of Alabama when the officers are seeking drugs or narcotics. It has been the long standing law in the State of Alabama that police officers in executing a search warrant must strictly comply with §15-5-9, Code of Alabama (1975). LaFitte v. State, 370 So. 2d 1108 (Ala. Crim., 1979); Reynolds v. State, 46 Ala. App. 27, 238 So. 2d 557 (Crim. App., 1970); Daniels v. State, 391 So. 2d 1021 (Ala., 1980).

The case sub judice, the court has not made a distinction which authorizes police officers to vary from the statutory require-

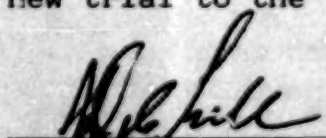
ments of §15-5-9, Code of Alabama (1975), when seeking narcotics. The effect of this is to deny Your Petitioner equal protection of the laws in that there is no viable or reasonable distinction between searching for evidence of one crime such as stolen goods and search for evidence of a crime such as possession of Cocaine.

The Petitioner request that this Honorable Court review the facts of this case to determine if his right to equal protection under the laws has been denied. This court should grant the Writ to make this determination now especially in view of the far reaching repercussions allowing such a distinction in the execution of search warrants in narcotics cases. Your Petitioner has exhausted all of his remedial rights in the courts of the State of Alabama and this court is the proper tribunal for redress

of his rights.

CONCLUSION

In conclusion the Petitioner, Thomas Marshall Irwin, respectfully submits that the decisions of the Court of Criminal Appeals of ALabama and the Supreme Court of Alabama in this case present conflict with prior decisions of this Honorable Court. For this reason, the Petitioner prays that this Honorable Court will issue the Writ of Certiorari and review the decision of the Honorable Court of Criminal Appeals of Alabama and the Supreme Court of Alabama and on such review will reverse the decisions of said courts granting a new trial to the Petitioner.

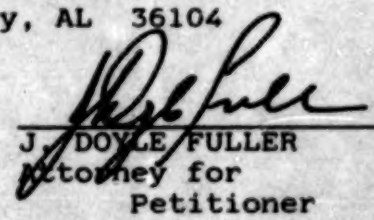


J. DOYLE FULLER
Attorney for
Petitioner

CERTIFICATE OF SERVICE

I, J. Doyle Fuller, a member of the Bar of the Supreme Court of the United States and attorney for the Petitioner, Thomas Marshall Irwin, do hereby certify that on this ____ day of _____, 1982, I did serve the requiste number of copies of the foregoing on the attorney for the Respondent by mailing same to him first-class, postage prepaid and addressed as follows:

State of Alabama
Hon. Charles A. Graddick
Attorney General's Office
250 Administrative Building
64 No. Union Street
Montgomery, AL 36104



J. DOYLE FULLER
Attorney for
Petitioner

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Montgomery, AL 36101

APPENDIX "A"

Mar 2 1982

THE STATE OF ALABAMA _ JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1981-82

7 Div. 873

Thomas Marshall Irwin

v.

Appeal from St. Clair Circuit Court

DeCARLO, JUDGE

Violation of the Alabama Uniform Controlled Substances Act; sentence: seven and one-half years.

Appellant was tried without a jury on facts stipulated by the parties. On January 28, 1980, St. Clair County law enforcment officers, along with Birmingham police officers, went to the residence of the appellant and conducted a search pursuant to a warrant. Birmingham Police Sgt. Cameron Guy testified that it was daylight, approximately 6:30 A.M., when the warrant was executed. He said that when the officers arrived they approached the back door of appellant's trailer, knocked, and announced their identity and purpose for being there. On receiving no response, they tried the back door, found it unlocked, and entered the trailer. According to Guy, they had warited about twenty-seconds

before entering the residence.

Sgt. Guy stated that when they entered the appellant's bedroom they found an automatic pistol, a small bag of cocaine, and a female companion in the appellant's bed with him. The serach also revealed a large bag of coaine in a plastic cooler and some marijuana in a trash can in the appellant's bedroom.

Deputy Luther McCain of the St. Clair County Sheriff's Department testified that he participated in the search of the appellant's residence. He stated that he had the search warrant in his hand when he knocked on the door and identified himself as a police officer. McCain said he announced that he had a search warrant and, after ten or fifteen seconds, he knocked against. At that time he checked the door to see if it was locked and, finding that it was not, he

and the other officers stepped inside and again made the announcment of their identity and purpose. McCain gave his opinion that he and the other officers waited a sufficient time for the occupants of the trailer to have heard them knocking before the officers entered.

No issue is made that the substance found in the appellant's bedroom was not cocaine.

I

The appellant contends that the search warrant failed to comply with the provisions of §15-5-9, Code of Alabama 1975, because it did not direct whether the search was to be made in the daytime of at any time of the day or night. Section 15-5-8, supra reads:

> "A search warrant must be executed in the daytime unless the affidavits state positively that the property is on the person or in the place to be searched, in which case it may be

> executed at any time of the day or night. The issuing judge or magistrate must state in the warrant, according to the character of the affidavits, whether it is to be executed by day or at any time of the day or night."

While it is true that the statute uses mandatory language ("must state") indicating that the time of execution must be specified, we can determine the purpose of §15-5-8, or the legislature's intent, only be examining the statute as a whole. See McWhorter v. State Board of Registration for Professional Engineers and Land Surveryors ex rel. Baxley, Ala. 359 So. 2d 767 (1978). We should also consider the particular evils at which the legislature is aimed. McWhorter, supra.

In our judgment, a reading of the statute as a whole compels the conclusion that it was the legislative intent to protect the citizen against service of a search warrant

at night. By requiring the issuring judge to state the time during which a warrant could be executed, the legislature intended to insure that a magistrate had considered the affidavits and decided whether the facts justified the unusual course of a nighttime search.

In the present case the affidavit filed with the search warrant did not meet the requirements for a nighttime search, but it did satisfy the statutory mandate for a daytime search. Therefore, the warrant was authorized to be served only in the daytime. The undisputed testimony showed that the warrant was, in fact, served in the daylight hours.

Warrant containing no directing or permission for nighttime service must be served in the daytime. Pugliese v. United States, 343 F. 2d 837 (1st Cir., 1965);

Moore v. United States, 57 F. 2d 840 (5th Cir., 1932); Johnson v. United States, 46 F. 2d 7 (6th Cir., 1931). In Johnson, supra, the Court of Appeals for the Sixth Circuit held that any error in the omission of the time of execution of the warrant, when the warrant was actually served in the daytime, was harmless.

In Jones v. State, 54 Ala. App. 167, 306 So. 2d 33 (1974), affirmed, 293 Ala. 762, 306 So. 45 (1975), we held that a warrant which lacked the mandatory statutory language "To any sheriff. . ." but which was, in fact, executed by the sheriff, was valid. Under the rationale of Jones, supra, we hold that although the warrant in question does not contain the language regarding time of service, it was in fact served at the proper time and was, therefore, not invalid.

II

The appellant next insists that the manner in which the warrant was executed violated the provisions of §15-5-9, Code of Alabama 1975, and rendered the search invalid. That section, known as the "knock and announce" rule, provides the following:

> "To execute a search warrant, an officer may break open any door or window of a house, any part of a house or anything therein if after notice of his authority and purpose he is refused admittance."
> (Emphasis added)

In the present case, the evidence is undisputed that the officers complied with the requirement that they announce their identity and purpose. The issue is whether they were "refused admittance". A verbal or affirmative refusal, however. is not always required, and if the occupants of the dwelling fail to responde within a reasonable time, refusal can be presumed. LaFitte v.

State, Ala. Cr. App. 370 So. 2d 1108, cert. denied, Ala. 370 So. 2d 1111 (1979). See also Conner v. State, Ala. Cr. App., 382 So. 2d 601 (1979), cert. denied, Ala., 382 So 2d 605 (1980). What constitutes a "reasonable time" is necessarily dependent on the particular facts and circumstances of each individual case. See Daniel v. State, Ala., 391 So. 2d 1021 (1980).

Appellant relies on Reynolds v. State, 46 Ala. App. 77, 238 So. 2d 557, cert. denied, 286 Ala. 740, 238 So. 2d 560 (1970), for the proposition that a two and one-half to five minute time lapse is unreasonable. He therefore maintains that the twenty-second interval in the present case was insufficient.

In Reynolds, supra, police officers armed with a search warrant went to the accused's resident, knocked on the doors and tapped on the windows for two and a half to five minutes.

After receiving no answer, but without announcing their authority and purpose, the officers pulled the latch out of the back door fram and entered the house. Writing for this court, Judge Price observed that the officers had failed to comply with the knock and announce statute. The critical point in Reynolds was not the time lapse before entry but the unannounced nature of the intrusion. Reynolds, therefore, is not authority for a particular time lapse which must occur before entry is accomplished. As the Alabama Supreme Court observed in Daniels v. State, "There are simply no set rules on the length of time an officer with a warrant must wait before using force to enter a house". 391 So. 2d at 1023.

The reasonableness of the officer's delay depends on a number of factors, including the likelihood of destruction of the

evidence and the possibility of danger to the officers or occupants of the dw lling. See generally, Annot., 70 A.L.R. 3d 217 (1976).

When, as here, the evidence is narcotics, and the likelihood of easy and swift destruction of the evidence is great, see Conner v. State, supra, the time which must elapse before entry is necessarily shortened. In addition, when, as in the case before us, there is not violent or forcible intrusion but entry through an unlocked door, the possibility of danger to the police or to the residents within is lessened. See 70 A.L.R. 3d 217, §3 at 228.

Finally, when the officers announce themselves not only at the outer door, but also once they have gained an unforced entry to the premises, as was done in the present case, the policies underlying the "knock and announce" statute have been doubly served. Officers

Guy and McCain testified that they walked through an unlocked door, repeated their announcement of authority and purpose "all the way down the hallway", and there "should have been enought time for anybody to have heard".

We find that the twenty-second interval between announcement and entry here was reasonable. Although the officers did not hear "scurrying". Conner v. State, supra, "running", Laffitte v. State, supra, or "movement", Daniels v. State, supra, inside appellant's trailer before they walked in, they were facted with the probability of easy disposal of the narcotics if they had delayed. In addition, their entry required no destruction of appellant's property and their repeated announcements, outside and inside the premises, provided the occupants a reasonable time to have heard them and refused admittance. We,

therefore hold, based on the specific facts of this case, that the method of execution of the warrant was proper.

We have examined the record and find no error; therefore the judgment of conviction by the St. Clair Circuit Court is affirmed.

AFFIRMED.

All the Judges concur

MAILING ADDRESS:

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832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

July 2, 1982

Re: 81-629
EX PARTE: THOMAS MARSHALL IRWIN
PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS
(Re: THOMAS MARSHALL IRWIN
Appellant

Vs.
STATE OF ALABAMA
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

XXXX Petition for Writ of Ceriorari denied. No Opinion. BEATTY, J. -- TORBERT, C.J., MADDOX, JONES AND SHORES, JJ., CONCUR.

/s/ Dorothy F. Norwood
Acting Clerk, Supreme
Court of Alabama

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

RE: CC 80-109

7th Div. 873, ST. CLAIR Circuit Court

THOMAS MARSHALL IRWIN
vs Appellant

THE STATE Appellee

Dear Sir: This is to advise you that on APR 30 1982, the Court of Criminal Appeals announced decision of:

~~affirmance~~
~~appeal dismissed~~
✓ application for rehearing overruled
~~petition denied dismissed stricken~~

} No opinion.

in the above stated cause.

Yours truly,
MOLLIE JORDAN, CLERK